A **ZAITUN MARKETING SDN BHD**

v.

BOUSTEAD ELDRED SDN BHD

B FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ALAUDDIN MOHD SHERIFF PCA
GOPAL SRI RAM FCJ
[CIVIL APPEAL NO: 02-47-2008 (W)]
C 16 JULY 2009

COMPANY LAW: *Winding up - Liquidators - Bringing or defending legal proceedings - Refusal of liquidator to bring or defend legal proceedings - Whether court empowered to authorize persons other than liquidator to*
D *conduct litigation in company's name*

COMPANY LAW: *Winding up - Liquidators - Bringing or defending legal proceedings - Whether liquidator authorized to appoint solicitors to bring or defend legal proceedings without leave of court or committee of*
E *inspection - Companies Act 1965, s. 236 (2)(a)*

COMPANY LAW: *Winding up - Liquidators - Bringing or defending legal proceedings - Whether liquidator authorized to appoint former director of company in liquidation to launch, continue or defend legal proceedings in company's name*

F

COMPANY LAW: *Winding up - Liquidators - Ordinary administrative and management duties of liquidator - Whether leave of court or committee of inspection required to appoint advocate to assist liquidator in such duties - Companies Act 1965, s. 236 (1)(e)*

G

COMPANY LAW: *Winding up - Suit by company - Jurisdiction of court - Power of court to authorize persons other than liquidator to conduct litigation in company's name - Whether such power only exercisable on liquidator's refusal to exercise authority*

H ***WORD & PHRASES:*** *'advocate' - Companies Act 1965, s. 236(1)(e), (2)(a) - Whether refers to an advocate and solicitor of the High Court*

In 1999, the appellant commenced a civil action against the
I respondent. However in 2004, the appellant was compulsorily wound up. Subsequently, the DGI gave consent to one KHI – a former director of the appellant but not a contributory or creditor – to

engage solicitors to continue the action against the respondent. The solicitors were appointed without authority of the court or the committee of inspection. The solicitors thereafter applied for a Mareva injunction against the respondent. The application was resisted principally on the ground that the DGI had not sought the leave of court or the committee of inspection under s. 236(1)(e) of the Companies Act 1965 ('the Act'), before consenting to the appointment of the solicitors. In the High Court, the judge dismissed the application on *inter alia* the basis that the appointment of solicitors by a liquidator had to be under s. 236(1)(e) with the prior authority of the court or the committee of inspection. Liquidators could not appoint solicitors to continue or defend an action solely by relying on s. 236(2)(a) of the Act independent of s. 236(1)(e), held the High Court. The appeal subsequently came before the Federal Court. The Federal Court was of the view that the main issue in the appeal was whether the DGI could give consent to KHI – a former director but non-contributory or non-creditor – to engage the firm of solicitors to continue the action against the respondent.

Held (dismissing the appeal)
Per Zaki Tun Azmi CJ:

(1) An appointment of an advocate by a liquidator pursuant to s. 236(2)(a) of the Act does not require leave of the court because the liquidator clearly needs the services of an advocate to bring or defend a legal action. Only the appointment under s. 236(1)(e) requires the leave of the court and that is when the liquidator needs an advocate to assist him in his "ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence." *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* (foll). (para 12)

Obiter:

The word 'advocate' in s. 236(1)(e) and in s. 236(2)(a), pursuant to the Interpretation Acts 1948 & 1967, means an advocate and solicitor of the High Court. (para 2)

A **Per Gopal Sri Ram FCJ:**

(1) Once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal
B proceedings. Once authority is given either by the liquidator or by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question. (paras 17 & 19)

C **(2)** However, the court has jurisdiction to authorize other persons to conduct litigation in the name of the company. The court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. Where, as in the instant case, the liquidator grants authorisation, there is no
D necessity to move the court. *Russell v. Westpac Banking* (foll). (paras 17, 18 & 19)

(3) Since a director – or more appropriately a former director of a company in liquidation – is not a party to the liquidation, a
E court will not authorise such director to launch or to continue proceedings or indeed to defend the company. All the more, the liquidator has no power to confer such authority, since he cannot do what the court will not do on his default. Thus in the instant case, KHI ought not to have been authorised to
F continue with the proceedings. It could well have been different if KHI had also been a creditor or a contributory. *Cape Breton Company v. Fenn* (foll). (paras 19 & 20)

(4) In the instant case, the High Court Judge had erred in holding
G that the liquidator had to obtain the leave of the court to appoint an advocate and solicitor to conduct the litigation. A liquidator who wishes to appoint an advocate and solicitor to prosecute, continue or defend an action by or against the company in liquidation may do so under s. 236(2)(a) of the
H Act without the leave of the court or the committee of inspection. *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* (foll); *Bensa Sdn Bhd (in liquidation) by its liquidator v. Malayan Banking Berhad Damansara Utama Branch*
I *& Anor* (ovrd). (paras 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Pada tahun 1999, perayu memulakan satu guaman sivil terhadap responden. Bagaimanapun, pada tahun 2004, perayu telah diperintahkan digulung. Berikutnya, Ketua Pengarah Insolvensi ('KPI') memberi persetujuan kepada KHI – seorang bekas pengarah perayu tetapi bukan seorang penyumbang atau pemiutang – untuk melantik peguamcara bagi meneruskan tindakan terhadap responden. Peguamcara telah dilantik tanpa kebenaran mahkamah atau jawatankuasa pemeriksa. Peguamcara kemudian memohon Injunksi Mareva terhadap responden. Permohonan telah ditentang secara prinsipnya atas alasan bahawa KPI, sebelum bersetuju dengan perlantikan peguamcara, telah gagal memohon kebenaran mahkamah atau jawatankuasa pemeriksaan di bawah s. 236(1)(e) Akta Syarikat 1965 ('Akta'). Di Mahkamah Tinggi, hakim telah menolak permohonan antara lain atas alasan bahawa perlantikan peguamcara oleh pelikuidator harus dibuat di bawah s. 236(1)(e) dengan kebenaran terdahulu mahkamah atau jawatankuasa pemeriksaan. Menurut Mahkamah Tinggi, pelikuidator-pelikuidator tidak boleh melantik peguamcara untuk meneruskan atau mempertahan sesuatu guaman semata-mata dengan bergantung kepada s. 236(2)(a) Akta dan bebas dari s. 236(1)(e) nya. Rayuan akhirnya di bawa ke Mahkamah Persekutuan. Mahkamah Persekutuan berpendapat bahawa isu utama rayuan adalah sama ada KPI boleh memberi persetujuan kepada KHI – seorang bekas pengarah tetapi bukan seorang penyumbang atau pemiutang – untuk melantik sebuah firma peguamcara untuk meneruskan dengan guaman terhadap responden.

Diputuskan (menolak rayuan)
Oleh Zaki Tun Azmi KHN:

(1) Perlantikan seorang peguam yang dibuat oleh pelikuidator di bawah s. 236(2)(a) Akta tidak memerlukan apa-apa izin dari mahkamah kerana seorang pelikuidator sememangnya memerlukan perkhidmatan seorang peguam untuk meneruskan ataupun membela sesuatu guaman. Hanya perlantikan di bawah s. 236(1)(e) memerlukan kebenaran mahkamah dan itu adalah bilamana pelikuidator memerlukan seorang peguam bagi membantunya mengendalikan "tugas-tugas pentadbiran dan pengurusan biasa seorang pelikuidator seperti hal-hal yang dirangkumi oleh bidang tanggungjawab profesionalnya" *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* (diikuti).

A ***Obiter:***

Perkataan 'peguam' di dalam s. 236(1)(e) dan s. 236(2)(a), berdasarkan kepada Akta-Akta Tafsiran 1948 & 1967, adalah bermakna seorang peguambela dan peguamcara Mahkamah
B Tinggi.

Oleh Gopal Sri Ram HMP:

(1) Sebaik sahaja sebuah syarikat berhad digulung, aset-aset dan liabiliti-liabilitinya terletakhak kepada pelikuidator. Terpulanglah
C kepada beliau sama ada untuk memulakan, meneruskan atau pun membela tindakan mahkamah yang ada. Sebaik mandat diberi sama ada oleh pelikuidator mahupun mahkamah, maka orang yang diberikan mandat tersebut boleh melantik peguam yang disukainya bagi meneruskan prosiding berkenaan.

D

(2) Bagaimanapun, mahkamah juga mempunyai bidangkuasa untuk membenarkan seorang orang lain untuk mengendalikan litigasi bagi pihak syarikat. Kuasa mahkamah untuk membenarkan orang lain selain dari pelikuidator untuk memulakan, meneruskan
E atau membela prosiding hanya berbangkit di mana pelikuidator enggan berbuat demikian dan enggan memberi izin. Di mana pelikuidator telah memberi keizinan, sepertimana dalam kes ini, maka tidak ada keperluan untuk pergi ke mahkamah. *Russell v. Westpac Banking* (diikuti).

F

(3) Oleh kerana seorang pengarah – atau lebih tepat lagi seorang bekas pengarah sebuah syarikat yang berada dalam likuidasi – bukan merupakan pihak kepada likuidasi, maka mahkamah tidak akan membenarkan pengarah sedemikian itu memulakan atau
G meneruskan prosiding atau malah untuk membela syarikat. Lebih-lebih lagi, pelikuidator tidak ada kuasa untuk memberikan kebenaran tersebut, kerana beliau tidak boleh berbuat apa yang mahkamah sendiri tidak akan perbuat atas kemungkiran beliau. Oleh itu, dalam kes semasa, KHI tidak seharusnya diberi
H kebenaran untuk meneruskan prosiding. Keadaan mungkin berbeza jika KHI juga merupakan seorang pemiutang atau penyumbang. *Cape Breton Company v. Fenn* (diikuti).

(4) Dalam kes semasa, Hakim Mahkamah Tinggi khilaf dalam memutuskan bahawa pelikuidator perlu mendapat kebenaran
I mahkamah sebelum melantik seorang pebuambela dan peguamcara untuk mengendalikan litigasi. Seorang pelikuidator

yang berhasrat untuk melantik seorang peguambela dan peguamcara untuk memulakan, meneruskan atau membela sesuatu tindakan oleh atau terhadap syarikat yang berada dalam likuidasi boleh berbuat demikian di bawah s. 236(2)(a) Akta tanpa kebenaran mahkamah atau jawatankuasa pemeriksa. *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* (diikuti); *Bensa Sdn Bhd (in liquidation) by its liquidator v. Malayan Banking Berhad Damansara Utama Branch & Anor* (ditolak).

Case(s) referred to:

Bensa Sdn Bhd (in liquidation) by its liquidator v. Malayan Banking Berhad Damansara Utama Branch & Anor [1993] 2 CLJ 68 HC ***(ovrd)***

Cape Breton Company v. Fenn [1881] 17 Ch D 198 ***(foll)***

Kang Wah Construction Sdn Bhd v. Chan Ai Min Property Sdn Bhd & Anor [1999] 7 CLJ 172 HC ***(refd)***

Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd v. Anafartalar Caddesi Sdn Bhd [2006] 2 CLJ 757 HC ***(refd)***

Russell v. Westpac Banking 13 ACSR 5 ***(foll)***

Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor [1994] 4 CLJ 899 HC ***(foll)***

Subterranean Natural Mineral Water Sdn Bhd v. Kho Boon Kwang [2002] 6 CLJ 340 HC ***(refd)***

Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2008] 9 CLJ 194 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 236(1)(e), (2)(a)

For the appellant - John Clark Sumugod (Bartholomew Lopez with him); M/s Sidek Teoh Wong & Dennis

For the respondent - Fahri Azzat; M/s Azzat & Izzat

[Editor's note: For the High Court judgment, please see Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2008] 9 CLJ 194.]

Reported by Andrew Christopher Simon

A

JUDGMENT

Zaki Tun Azmi CJ:

[1] Leave to appeal to the Federal Court was granted on the following question:

B

> Whether the Official Receiver/Liquidator can appoint an advocate and solicitor to bring an action or to defend an action solely by relying on section 236(2)(a) of the Companies Act 1965 independent of section 236(1)(e)?

C

[2] From the question, it would seem that the main issue is the interpretation of s. 236(1)(e) and s. 236(2)(a) of the Companies Act. This section deals with the power of the liquidator to "appoint an advocate to assist him in his duties" as an advocate to act on behalf of the wound up company. By the way, according to the Interpretation Acts 1948 and 1967, "advocate" means an advocate and solicitor of the High Court.

D

[3] The dispute arose because Messrs. Sidek Teoh Wong & Dennis (Messrs. Sidek Teoh) was appointed without authority of the court or the committee of inspection. The appellant argues that the authority of the court or the committee of inspection is not necessary because they are relying on s. 236(2)(a).

E

[4] At the outset of the appeal we posed to the appellant's counsel the question as to whether this court's ruling based on the question would benefit the appellant in this case. This question was put to the appellant for two reasons. Firstly this issue was raised during an application by the appellant for Mareva Injunction against the defendant to restrain the defendant from transferring its assets to a third party. That Mareva injunction was dismissed by the learned High Court judge. The suit was filed in 1999. On 28 September 2004, a winding up order was made against the plaintiff.

F

G

[5] The application for Mareva Injunction was filed by Messrs. Sidek Teoh purportedly on behalf of the official receiver and plaintiff in August 2007. The application for Mareva Injunction was dismissed on 12 June 2008. We only heard this appeal on 16 June 2009.

H

I

[6] For myself, I suspected that the issue had become academic. However, the appellant, while admitting it may be academic, persisted and said that it would still be applicable to several other pending applications at the High Court.

[7] The second reason why I thought that the appeal is academic is because our decision will be based on the findings of fact by the learned trial judge. The learned trial judge held that even if s. 236 is to be decided in favour of the appellant, the appointment of Messrs. Sidek Teoh as advocates was not made by the official receiver but by one Khaidzir who is neither a contributor nor a director at the time he appointed Messrs. Sidek Teoh. He was merely an ex-director of the appellant company. Section 236 cannot apply because under that section the appointment must be by the liquidator who in this case, is the official receiver. This is quite obvious because from the two letters signed by the official receiver addressed to En. Khaidzir, it is clear that the appointment of Messrs. Sidek Teoh was not made by the official receiver. In one letter the official receiver used the words "kami tiada bantahan untuk tuan mewakili kes di atas" and the other addressed to En. Khaidzir "permohonan tuan untuk melantik Tetuan Sidek Teoh Wong & Dennis ... adalah dibenarkan".

[8] This case could have just been disposed on that issue alone. However, before dismissing the application for a Mareva Injunction, the learned judge went at length to discuss s. 236(1)(e) and s. 236(2). And after a lengthy discussion quoting several High Court judgments, he concluded that an advocate can only be appointed under s. 236(1)(e) with the authority of the court or a committee of inspection.

[9] The learned judge during the course of his judgment cited *Subterranean Natural Mineral Water Sdn Bhd v. Kho Boon Kwang* [2002] 6 CLJ 340, *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899, *Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd v. Anafartalar Caddesi Sdn Bhd* [2006] 2 CLJ 757 and *Kang Wah Construction Sdn Bhd v. Chan Ai Min Property Sdn Bhd & Anor* [1999] 7 CLJ 172. He also considered the opposing views expressed in *Bensa Sdn Bhd (in liquidation) by its liquidator v. Malayan Banking Berhad Damansara Utama Branch & Anor* [1993] 2 CLJ 68. He concluded that he agreed with the

judgment in *Bensa*. In the first set of judgments beginning with *Selvam Holdings*, the ruling was that s. 236(1)(e) "does not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator". This is in line with the other three cases. *Bensa* on the other hand decided that "a liquidator must obtain prior authority of the court or the committee of inspection".

[10] An important aspect of the duties of a liquidator is to recover debts and properties due to the company as well as to assert its rights. This would more often than not involve proceeding in courts. He is also obliged to defend proceedings brought against the company. Again, these proceedings could be claims for monies and other assets of the company. The liquidator must appoint an advocate and solicitor to act for them in these cases. The appointment of an advocate is necessary to represent him in court. The Rules of the High Court require a company to be represented in court by an advocate. The question is whether an appointment for this purpose also requires the sanction or consent of the court. I do not think so. It is quite obvious that an advocate needs to be appointed when it involves proceedings in court. A consent or sanction of the court becomes superfluous.

[11] The liquidator's other duties include, for example, power to effect a compromise with the company's debtors where the amount claimed by the company exceeds the prescribed amount. Other duties would include entering into contracts with different parties. In these circumstances, he would also require the advice of an advocate. "Presumably, the reason for requiring the court's or committee's approval in these cases is that the matters involved are sufficiently important, or the possibility of errors or fraud sufficiently great, to justify the imposition of a restriction on the liquidator's liberty of action."[1]

[12] These views expressed by the author, support the views expressed by Abdul Aziz Mohamad J (as he then was) in *Selvam Holdings* and I agree with the learned judge's view. An appointment of an advocate by a liquidator pursuant to s. 236(2)(a) of the Companies Act does not require leave of the court because he clearly needs the services of an advocate to bring or defend a legal action. Only the appointment under s. 236(1)(e) requires the leave of the court and that is when he needs an advocate to assist him

in his "ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence." (to borrow the words of Abdul Aziz J) I do not need to quote the full text from his judgment as my learned brother Gopal Sri Ram FCJ has done so.

[13] In the light of what I had said earlier in para 8, this appeal is dismissed with costs and deposit to be utilised towards costs.

Gopal Sri Ram FCJ:

[14] On 24 November 2008, this court granted the appellant leave to appeal on the following question: whether the official liquidator of the Department of Insolvency is authorised to appoint an advocate and solicitor to institute or defend legal proceedings pursuant to s. 236(2)(a) of the Companies Act 1965 ("the Act"), independent of s. 236(1)(e) of the Act. However, as arguments developed before us at the hearing proper on 16 June 2009, it became apparent that s. 236 had really nothing to do with the fact pattern of this appeal, although that provision had been erroneously referred to and relied upon by the parties in the courts below. The real issue at the heart of this appeal is whether sanction may be granted by the Director General of Insolvency ("the DGI" for short) to a former director of a company in liquidation who is also not a contributory or creditor to use the name of the company to bring, continue or defend an action.

[15] The relevant facts and the arguments advanced on s. 236 have been admirably dealt with by Hishamuddin J (now JCA) who heard the matter at first instance and whose judgment has been reported in [2008] 9 CLJ 194. I therefore find it sufficient merely to allude to those facts purely relevant to the issue at stake.

[16] As long ago as 1999, the appellant, then a going concern, brought an action against the respondent for goods sold and delivered. On 28 September 2004, while the action was afoot, the appellant was compulsorily wound up by an order of that date. By a letter dated 16 March 2005, the DGI gave his consent to one Khaidzir bin Hj. Ishak, a former director, though not a contributory or a creditor, of the appellant to engage the services of a firm of solicitors to prosecute the action pending against the respondent. Although the letter does not expressly say as much, its proper construction admits only of the conclusion, namely, that the DGI

was granting his permission, on terms, to Khaidzir to use the name of the appellant in liquidation for the limited purpose of continuing with the action in question. It may be advisable for the DGI in future cases to grant such consent in clear terms. After having obtained permission, the appellant moved the High Court inter partes for a Mareva injunction. The application was opposed principally on the ground that the DGI had to seek the leave of the court or the committee of inspection under s. 236(1)(e) before he permitted the appointment of solicitors. And so, the case went tangentially off course.

[17] What appears to have been overlooked all round is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the court to authorise other persons to conduct litigation in the name of the company.

[18] In *Russell v. Westpac Banking* 13 ACSR 5, King CJ when delivering the judgment of the Full Court of South Australia said:

> When the company is in liquidation, the person in whom is vested the authority to institute proceedings, is the liquidator: *Scarel Pty Ltd v. City Loan & Credit Corporation Pty Ltd* [1988] 12 ACLR 730. There is power, however, in the court to authorise other persons to conduct litigation in the name of the company: *Cape Breton Company v. Fenn* [1881] 17 Ch D 198; *Aliprandi v. Griffith Ventures Pty Ltd* [1991] 6 ACSR 250.

[19] Of course, resort to the court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. But where, as here, the liquidator grants authorisation, there is no necessity to move the court. Once authority is given either by the liquidator or by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question. The only issue is whether it is competent for the liquidator to authorise a former director of the company in liquidation to use the company's name to commence, continue or defend proceedings. The answer to that question was provided by Cotton LJ in *Cape Breton Company v. Fenn* [1881] 17 Ch D 198 as follows:

> … '*prima facie* proceedings in the name of the company ought to be conducted by the liquidator-an officer appointed by the Court and subject to the supervision of the Court. There may be, no doubt, special cases where, although the Court does not think fit to remove the liquidator on the ground that his conduct in not bringing an action is improper, it may give power to other persons to conduct the litigation upon their giving proper indemnity against any consequences of that litigation. But who are the persons who can be authorized to take these steps? In my opinion the creditors and the contributories only, not under any special clause of the Act, but because they are the persons who, under the terms of the Act, can intervene if they are advised that the liquidator does not properly do his duty. They have a right in special cases to ask the Court for leave to do that which the liquidator is advised not to do, or which, because he has no funds, he does not do, *viz.*, take proceedings in the name of the company, but in my opinion the power of the Court to give leave to use the name of the company stops there, and is confined to those who are parties to the liquidation. The Court has, in my opinion, no power whatever to give persons in the position of the solicitors authority to use the name of the company in any litigation against any other person.

[20] Since a director – or more appropriately a former director – of a company in liquidation is not a party to the liquidation a court will not authorise him or her to launch or to continue proceedings or indeed to defend them. A *fortiori*, the liquidator has no power to confer such authority, since he cannot do what the court will not do on his default. It follows that Khaidzir bin Hj. Ishak ought not to have been authorised to continue with the proceedings. I would on that ground support the ultimate order made by the learned judge in the High Court. It may well have been different if Khaidzir had also been a creditor or a contributory.

[21] For completeness there remains the question whether the learned judge was correct in holding that the liquidator in this case had to obtain leave of the court to appoint an advocate and solicitor to conduct the litigation. With respect I must express my disagreement. In my judgment, the correct view is that expressed by Abdul Aziz J in *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899 as follows:

The second point is that s. 236(1)(e) does not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator. Paragraph (e) of s. 236(1) speaks of the appointment of an advocate by a liquidator 'to assist him in his duties'. In my opinion the duties envisaged are the ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence. It is only that kind of duties that the words 'to assist' can comfortably go along with.

When a liquidator is sued, as in this case, the liquidator has a problem which falls outside his professional competence as liquidator and for which he must engage an advocate and solicitor to represent him to resist the suit. The first respondent's duty to resist this application is not, in my opinion, one of a kind intended by the word 'duties' in paragraph (e), and counsel acting for him in this case cannot be said to have been appointed by him 'to assist him in his duties.'

As to whether a liquidator's power to appoint an advocate to defend him in an action brought against him falls under s. 236(2)(a) or (i) is a secondary question. Paragraph (i) of s. 236(2) – which gives power to 'appoint an agent to do any business which the liquidator is unable to do himself' – appears to be wide enough to enable a liquidator to appoint an advocate and solicitor to defend him. If in defending this application the first respondent can be said to be doing so 'in the name and on behalf' of the applicant, I would decidedly say he had power, under paragraph (a) of s. 236(2), to appoint an advocate and solicitor because to defend any action he must necessarily engage an advocate and solicitor.

Whatever the position may be under s. 236(2), as long as the first respondent is not caught by paragraph (e) of s. 236(1) – and I do not think he is – he does not need to get the authority either of the Court or of the committee of inspection to appoint an advocate and solicitor.

In short, a liquidator who wishes to appoint an advocate and solicitor to prosecute, continue or defend an action by or against the company in liquidation may do so under s. 236(2)(a) without the leave of the court or the committee of inspection.

[22] It follows that the learned judge was wrong in his reasoning although the order he made was entirely correct. It also follows that *Bensa Sdn Bhd (in liquidation) by its liquidator v. Malayan Banking*

Berhad Damansara Utama Branch & Anor [1993] 2 CLJ 68 which the judge preferred when arriving at his conclusion was wrongly decided and is not good law.

[23] For the reasons already given, I would dismiss this appeal and affirm the orders of the courts below, *albeit* for different reasons. The appellant must pay the costs of this appeal. The deposit shall be paid out to the respondent.

[24] The President of the Court of Appeal has seen this judgment in draft and has expressed his agreement with it.

Endnote:

1. See A. Keay (1999), McPherson, *The Law Of Company Liquidation*, 4th edn, LBC Information Services, Sydney, p. 333.